In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 111

DANIEL CASTANEDA GONZALES, PETITIONER

v.

H. R. LANDON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION OF DISTRICT NO. 16, ET AL.

ON WRIT OF CERITORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINION BELOW

The opinion of the Court of Appeals (R. 34–38) is reported at 215 F. 2d 955.

JURISDICTION

The judgment of the Court of Appeals was entered on September 8, 1954 (R. 38). On December 7, 1954, the time for filing a petition for a writ of certiorari was extended, by order of Mr. Justice Douglas, to and including February 5, 1955 (R. 38). The petition was filed on February 4, 1955, and was granted on May 31,

1955 (R. 39). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial court's holding that petitioner had voluntarily remained outside the jurisdiction of the United States in order to evade military service during World War II is supported by sufficient evidence.

2. Whether Section 401 (j) of the Nationality Act of 1940, providing for the expatriation of American citizens who depart from or remain outside the jurisdiction of the United States in time of war for the purpose of evading service in the armed services, applies to an American who had been living abroad for many years when he attained the age of 18 in 1942 and registered for Mexican service in that year, and who did not return to this country until 1946.

3. Whether Congress has the constitutional power to provide, as it did in Section 401 (j) of the Nationality Act, for the expatriation of native-born citizens who, in time of war, voluntarily remain outside the jurisdiction of the United States for the purpose of evading service in its armed forces.

STATUTE INVOLVED

Subsection (j) of Section 401 of the Nationality Act of 1940, 54 Stat. 1137, as amended by the Act

of September 27, 1944, 58 Stat. 746 (8 U. S. C. (1946 ed.) 801 (j)), provided:[1]

> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * * *
>
> (j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States. * * *

The full text of Section 401 of the Nationality Act is set forth in the Appendix, *infra*, pp. 64–66.

STATEMENT

Petitioner seeks reversal of the judgment of the Court of Appeals for the Ninth Circuit (R. 38), affirming the judgment of the District Court for the Southern District of California dismissing petitioner's action for a declaratory judgment under Section 503 of the Nationality Act of 1940 (R. 5–6). Petitioner sought to be declared a citizen of the United States (R. 1–2), but the court found that he had expatriated himself under Section 401 (j) of the 1940 Act "by voluntarily remaining outside the jurisdiction of the United States * * * for the purpose of evading or avoid-

[1] The provision is now incorporated in section 349 of the Immigration and Nationality Act of 1952, 66 Stat. 267, 8 U. S. C. 1481 (a) (10).

ing training and service in the land or naval forces of the United States" (R. 5–6).

The evidence before the District Court reveals that petitioner was born in the United States on July 21, 1924 (R. 7). When he was less than two years of age, he was taken by his parents to reside in Favela, Chihuahua, Mexico, approximately 350 or 400 miles from El Paso (R. 7–8). Petitioner's father died when petitioner was about 10 or 11 years of age (R. 8). His mother told petitioner, when he was about 12, of his birth in the United States (R. 8). He did not attend school after his father's death (R. 13). He worked for his mother for about 10 years, helping to support her and the five younger brothers and sisters (R. 12). His work consisted of planting and picking corn and beans at a sort of ranch 20 kilometers from town (R. 13). He first desired to return to the United States in 1937 to attend a mechanical course, but his "mother wouldn't let [him]" (R. 17). In 1942, he registered for military service in Mexico (R. 16).

On April 23, 1946, petitioner was admitted to the United States as a native-born citizen (R. 8, 12), and at this time he registered for selective service with the United States Consul (R. 12). Upon a later return to Mexico and attempt to reenter the United States in 1947, petitioner was excluded, the Board of Special Inquiry of the Immigration and Naturalization Service finding that he had lost his citizenship by reason of

remaining outside the jurisdiction of the United States until 1946 for the purpose of avoiding military service (R. 8, 19).

The transcripts of petitioner's testimony before the Board of Special Inquiry on October 2, 1947, and upon subsequent occasions when petitioner was excluded (in 1950 and 1952), were placed in evidence upon stipulation of counsel for the government and petitioner that the proper officers would testify to their accuracy (R. 24, 26–27).[2] Portions of the transcript of October 2, 1947, containing petitioner's testimony, which were read into the record at the trial in the District Court, included the following statements by him: He admitted that he learned in 1942 that the United States was at war (R. 14). In 1944, he learned from some United States citizens living in Mexico that he was required to register at the United States consulate for military service (R. 14–15), but he did not want to register as he was "afraid of military service during the war" (R. 15). He would have returned to the United States in 1942 but his mother "would not permit [him] to do so", and he would have come to the United States in 1944 or 1945 had it not been for "the war" and "the requirement to register" (R. 17–18). He admitted that he remained outside of the jurisdiction of the United States from Sep-

[2] The transcripts, constituting Exhibit A of the record before the District Court, are not reproduced in the printed record but have been lodged with the Clerk of this Court.

tember 1944 until April 23, 1946, for the purpose of evading military service (R. 19–20).

The transcript of a second hearing on October 5, 1950, showed that the 1947 statements were read to petitioner and he stated: "I was denied admission because I was afraid but now I am willing to serve in the armed forces" (R. 19). He further explained his mother's influence as follows (R. 19):

> Q. Why was your mother willing for you to come to the United States in 1946 but unwilling for you to come to the United States in 1943, 1944 or 1945?
>
> A. In 1946 my mother was not afraid that I would be taken off to war.

In another hearing held in California on January 9, 1952, pursuant to a further attempt of petitioner to enter the United States (R. 24–25), he again admitted his purpose of evading selective service, as follows (R. 24):

> Q. In your hearing before boards of special inquiry at El Paso, Texas, in 1947 and 1950, did you admit that you had remained in Mexico during World War II for the purpose of evading or avoiding training or service in the armed forces of the United States during time of war and were you excluded as an alien immigrant not in possession of an unexpired immigration visa and passport?
>
> A. Yes, sir, I did, and they did tell me that I needed to get a passport and immi-

gration papers to enter the United States. The only thing was I did not do so but entered without.

He also testified as follows (R. 26):

Q. Was fear of military service in time of war the only reason that you did not register for United States military training and service prior to 1946?

A. The only true thing is and the only one I give now is my mother's fear of military service for me. I could have registered for it at Chihuahua, Mexico. I went there two or three times, the capitol of the state. It was because of the fear of my mother that I did not do so before 1946.

* * * * *

Q. Were you aware that you could have registered for the United States military service in Mexico prior to 1946 had you desired to do so?

A. Yes, sir. I later thought of registering for it in Chihuahua, Mexico where I went a few times, but as my mother did not wish me to do so I did not do so.

At the District Court trial, in 1953, petitioner asserted that he did not make the admissions recorded in the transcripts of his three prior appearances before the immigration authorities (R. 14–20, 26), and that certain of such admissions represented confusion in utterance on his part (R. 14). He then explained his remaining in Mexico until 1946 by stating that his mother did not "let" him return to the United States

(R. 9, 18), and "did not permit [him] to leave the house" (R. 14, 16–17, 19, 26); and that his mother mentioned nothing about fear of military service to him (R. 26). He testified at the trial that he came to the United States in 1946 to establish his rights as a citizen, and because there was insufficient room in his mother's accommodations in Mexico (R. 10–11); that he did not know until 1946 that the United States had been at war (R. 13–14, 16); that he read no newspapers until 1946 (R. 13); and that he knew no United States citizens in Mexico (R. 15).

The trial judge dismissed petitioner's action for a declaratory judgment (R. 5–6), stating[3] that he did not believe the testimony which petitioner gave before him, notably the statements that petitioner had not known of the war and his responsibility in connection with it (R. 32), or the testimony that petitioner could not return to the United States before 1946 because his mother would not let him out of the house (R. 33). The judge appraised petitioner as intelligent (R. 32, 34) and "a pretty bright young fellow" (R. 32), "not what you call a peon by any means" (R. 32). He evaluated the consistent admissions of petitioner at the three administrative hearings as more accurate than the testimony "after [petitioner] consulted counsel and found out what his legal rights were" (R. 33). Recognizing that, upon petitioner's establishing his original status

[3] Formal findings were waived. R. 34.

as a citizen by birth, the burden was upon the government to prove the facts by reason of which citizenship was lost (R. 21), the judge concluded that petitioner's testimony in the administrative proceedings not only impeached his evidence at the trial but constituted affirmative testimony (R. 29).[4]

The Court of Appeals affirmed (R. 38), holding that the District Court's finding was "overwhelmingly" supported by the testimony in the administrative proceedings (R. 36). The court further held the expatriation statute constitutional (R. 36).

SUMMARY OF ARGUMENT

I

The facts are undisputed that petitioner, a citizen of the United States by birth, residing in Mexico since infancy, was informed of his citizenship and intended at an early age to return to the United States, but that when he became 18 years of age in 1942 he registered for Mexican military service, and he did not register for service in the armed forces of the United States until April 1946—nine months after the close of hostilities in the summer of 1945—when he first sought to re-enter the United States.

[4] The judge distinguished a case in which he had himself ruled otherwise, as having involved a person who was "away in the depths of Mexico and * * * didn't appreciate or have an opportunity to recognize his obligations" (R. 33).

With respect to the motivation of petitioner's failure to return to the United States until 1946, the transcripts of separate hearings before Boards of Inquiry of the Immigration and Naturalization Service in 1947, 1950, and 1952, produced in evidence at the District Court trial, embodied consistent and detailed admissions by petitioner that he knew of the entry of the United States into the war as early as 1942 and that he knew in 1944, from contacts with people coming from the United States, that he was required to register, but that his mother's fears for him during actual warfare and his own desire to evade military service until after the war was over kept him in Mexico until 1946.

At the trial in 1953, petitioner denied that he had made the admissions appearing in the three transcripts and stated that he had remained in Mexico because his mother forbade his leaving her, and that he had worked on a farm and had not known of the involvement of the United States in the war until 1946 when some workers crossing the border informed him.

The trial judge, weighing the evidence, disbelieved petitioner's 1953 explanation. He appraised petitioner as an intelligent and bright young man and considered entirely implausible petitioner's protestations of lack of knowledge of the war and his ascribing of the delay in return to his mother's orders.

On the evidence, the judge was clearly entitled to disbelieve petitioner's trial testimony and to find that he voluntarily removed outside of the United States in order to evade the draft. The earlier transcripts not only impeached the trial testimony but also—being admissions by a *party* to the cause—constituted proper substantive evidence. *Miles* v. *United States,* 103 U. S. 304, 308–309, 311; 4 Wigmore, *Evidence* (3d ed.) § 1048. Petitioner's repeated and consistent earlier admissions, in the context of the indisputable chronology of events and acts, constitute clear, unequivocal, and convincing evidence upholding the finding that he voluntarily remained in Mexico until after the war in order to evade his obligation to register for service in the armed forces of the United States.

II

On the findings of the courts below, petitioner was expatriated under Section 401 (j) of the Nationality Act of 1940 (as added in 1944).

A. Petitioner argues, for the first time in his brief on the merits, that Section 401 (j) applies only to draft-evaders who left the country in order to avoid service, and does not apply to a person like himself who was living abroad and remained there with a like purpose. But the Act clearly covers, in precise terms, those "departing from" *or* "remaining outside" "the jurisdiction of the United States" "for the purpose of evad-

ing *or* avoiding training and service" (emphasis added). And there would be no reason for Congress to distinguish between the American who departs to evade service and he who, happening to live abroad, deliberately remains there for the same end. By intentionally choosing to remain in Mexico and not to register or return, petitioner deprived the United States of the possibility of his services just as effectively as if he had fled there.

B. Also raised for the first time in the brief on the merits is the contention that the United States-Mexico Executive Agreement of January 22, 1943, relating to the nationals of either country in the armed forces of the other, excused him from American service since he claims to have registered for Mexican service in 1942, and asserts that the Agreement contemplated that such persons could be transferred to the armed forces of the other country only with their consent.

The short answer is that this Agreement establishes the rights of the two countries *inter se* and does not confer any rights on individuals *against their own country;* insofar as petitioner was concerned as an American citizen, the United States gave up no claim by the Agreement and he acquired no rights as against this country. The only rights he may have acquired were against Mexico. This is clearly illustrated by the fact that when the United States did begin (in the latter part of 1943) to call for service Americans resident

abroad, no exception was made for those living in Mexico or registered under Mexican law. In any event, nothing in the Executive Agreement even remotely suggests that petitioner would be or was excused from *registering* under the United States selective service laws, and this he failed to do for the specific purpose of evading service.

Moreover, Section 401 (j) does not, expressly or impliedly, excuse Americans from the effect of draft evasion or avoidance because of registration for foreign service. In contrast, Section 401 (c) of the Nationality Act, dealing with dual nationals entering or serving in the armed forces of a foreign state of which they are also nationals, provides for expatriation unless such service has been "expressly authorized by the laws of the United States." If there were a conflict, Section 401 (j) would, of course, prevail over the earlier Agreement, but, as we have shown, on a proper reading of the Agreement there is no clash since it does not affect the obligations and duties of Americans resident in Mexico toward this country.

C. Likewise suggested for the first time in the brief on the merits is the argument that Section 401 (j) could not apply to petitioner before he became 21 in July 1945. But the 1940 Nationality Act established 18 as the age at which other comparable acts of expatriation could be committed. The only reason that this general age limit was not expressly extended to Section 401

(j) is that the latter provision obviously contains its own built-in age limit—the age at which one becomes subject, in a particular war or during a particular emergency, to draft or selective service legislation.

III

Congress acted within its constitutional powers in prescribing expatriation for draft-evaders remaining outside the jurisdiction of the United States in time of war.

A. The power to expatriate is an implied attribute of sovereignty with which the United States is invested as a nation, even though such power is not expressly stated in the Constitution. *Mackenzie* v. *Hare,* 239 U. S. 299. The authority to exercise that power is not restricted merely to the recognition of the subjective intent of a citizen to expatriate himself. Congress may—on grounds which are reasonable, giving due consideration to the precious character of American citizenship—fix the conditions which result in loss of nationality, regardless of the subjective intent of the individual citizen who performs the expatriating act. While the courts have found that Congress intended the act which results in expatriation to be a voluntary one, they have expressly held that the person voluntarily performing the specified act loses his nationality by the performance of such act, irrespective of his knowledge or intent that he would thereby renounce United States nationality. E. g. *Sav-*

orgnan v. *United States,* 338 U. S. 491. The consistent current of responsible judicial decision in this country has recognized the power of Congress to impose loss of nationality on citizens performing certain acts voluntarily.

B. Prescribing loss of nationality for those who remain out of the country to avoid military service in wartime is a reasonable exercise of the power of Congress, in the national interest, to fix the conditions of expatriation. Such persons, by their own conduct, place themselves in a class significantly different from other citizens, different even from other groups of evaders for whom the ordinary criminal sanctions are available. They also present a problem in international relations since, so far as other countries are concerned, they remain United States citizens, while, so far as this nation is concerned, they have refused to meet the obligations of citizenship.

Ever since the Civil War, the United States has felt the need for legislation of the type here involved. A statute in force from 1865 to 1940 prescribed forfeiture of "rights of citizenship" for those who left the district of registration to evade the draft, apparently even if they did not leave the country. The constitutionality of that statute has consistently been assumed by the courts and it was administratively treated as a full expatriation statute.

The statute involved here (Section 401 (j)) was added to the Nationality Act in 1944 because

draft evasion in World War II revealed the same need as had existed in earlier times of emergency. The provision applies only to those draft evaders who depart or remain out of the country to avoid service. Since readiness to serve in the forces—claims of conscience aside—has always been a cardinal element of our citizenship, such draft evasion is a repudiation of the most important demand of allegiance, and an expression of preference for whatever protection another country may give in place of fulfillment of a prime duty of American citizenship. One who intentionally chooses foreign residence in preference to the obligations of citizenship is not in a position to challenge the right of Congress to implement his choice by severing the cords of the allegiance he has rejected.

ARGUMENT

I

The District Court's holding that petitioner voluntarily remained out of the jurisdiction of the United States in order to evade military service was based upon ample substantive evidence and should be accepted

A. The district judge, as the trier of the facts, was confronted with two bodies of evidence. The first consisted of the written transcripts of petitioner's sworn testimony on three separate occasions before Boards of Inquiry of the Immigration and Naturalization Service, in 1947, 1950, and 1952, each of which included a clear admission by petitioner that he remained outside the

United States until the cessation of hostilities for the purpose of evading military service. *Supra,* pp. 5–7.

The second body of evidence consisted of petitioner's later testimony at the trial, in 1953, in which the general chronological and factual basis of petitioner's earlier admissions was corroborated, but in which the motive of draft-evasion was denied and the explanation proffered was simply that petitioner's mother would not allow him to leave Mexico and that he had not known, before 1946, of World War II or of his obligations as a United States citizen to register for military service. *Supra,* pp. 7–8.

The trial judge, having full opportunity to observe petitioner personally as he testified in court, disbelieved petitioner's new explanation of why he came to the United States only after the years of actual warfare had ended. The court found the facts to be as stated in petitioner's earlier testimony before the administrative tribunals, *i. e.,* that petitioner's mother's requests for him to remain in Mexico and his own motives for remaining had both been based upon the fact that hostilities were in progress before 1946, the year when he first returned.

The judge's appraisal of petitioner as an intelligent and bright young man (*supra,* p. 8) was a clear rejection of the efforts at the trial to portray his earlier testimony as a confused, inaccurate statement (*supra,* p. 7), and the

judge, just as clearly, found against the truth of the remainder of petitioner's later explanation, appraising it as mere self-serving testimony developed "after he consulted counsel and found out what his legal rights were" (*supra,* p. 8). Such evaluations are peculiarly within the province of the trial court, which hears and observes the witness. *McAllister* v. *United States,* 348 U. S. 19; *Knauer* v. *United States,* 328 U. S. 654, 660. Petitioner attempts (Pet. Br. 28–30) to establish some sort of rule-of-law for Mexican-American citizenship cases which would *require* the trier of facts to disregard prior statements made before administrative agencies, but it is obvious that there cannot be such a rule.[8] A reading of the three District Court cases petitioner cites shows that each was decided by the trial judge on its own facts and his own appraisal of the particu-

[8] Apparently to suggest that the Immigration Service interpreters are not satisfactory, petitioner remarks (Pet. Br. 4, 28, fn. 21) that the first interpreter at the trial, "a representative of the Immigration Service," was incompetent. But he fails to point out the significant facts that (a) petitioner's trial counsel provided no interpreter, and apparently assured Government counsel that petitioner would be able to understand and answer in English (R. 9); (b) when the court insisted on an interpreter, petitioner's counsel requested the "representative of the Immigration Service," who happened to be in court, to act as interpreter, although Government counsel expressed doubt as to this representative's ability to speak the language (R. 9); (c) it is quite obvious that this representative (Mr. Chandler) was not a regular interpreter used by the Immigration Service (see R. 11); and (d) it was Government counsel who insisted that a qualified interpreter be obtained (R. 11).

lar plaintiff before him.[6] In this very case, District Judge Harrison pointed out that in an earlier case he had held against expatriation of a Mexican-American because the "boy was away in the depths of Mexico and I admitted him because I felt he didn't appreciate or have an opportunity to recognize his obligations" (R. 33). But Judge Harrison found petitioner to be of an entirely different stripe (*supra*, pp. 8–9).

Petitioner also stresses (Pet. 26; Pet. Br. 26, 30) the special burden of proof in expatriation cases, but there is no basis for contending that that burden was misunderstood or misapplied in this instance. The trial judge clearly recognized that, upon the showing of United States citizenship by reason of petitioner's place of birth, the burden of showing loss of that citizenship was on the government (*supra*, pp. 8–9). But that burden could not have called for a greater degree of proof than that

[6] In *Ponce* v. *McGrath*, 91 F. Supp. 23, 25 (S. D. Cal.), Judge Metzger specifically found, from his observation of the plaintiff, that there was a "lack of understanding." "I formed the belief from watching him closely that he was trying his best to answer honestly, although at times he was considerably confused and faltered in uncertainty, and his attitude showed no marks of dishonesty but of extreme ignorance and considerable embarassment arising from it." In *Nieto* v. *McGrath*, 108 F. Supp. 150, 154–5 (S. D. Tex.), Judge Allred indicated that he did not find the plaintiff very intelligent, that it was doubtful that he even knew he was an American citizen; and the opinion speaks of "a Mexican peon." *Martinez* v. *McGrath*, 108 F. Supp. 155, 156 (S. D. Tex.) (Allred J.) follows the *Nieto* case, and refers to the plaintiff as "of the same illiterate type as Nieto."

actually adduced. Only petitioner's inner motives were in issue, and such elements of inner mental fact can be proved, of course, only by outer manifestations. Indeed, it is rarely possible to obtain as clear a body of evidence as that presented here. The time chosen by petitioner to return—the Japanese warfare ended September 2, 1945, and petitioner appeared at the gates of the United States on April 23, 1946—afforded eloquent background and support for petitioner's own admissions and both these factors were further illuminated by petitioner's conduct on the stand, as observed and noted by the judge.

Thus, the outward facts were undisputed and the subjective intent was as clearly disclosed as such intent is capable of being proved. The government did not—and ordinarily could not—produce friends of petitioner to attest to public admissions by him of his true motivation for remaining in Mexico—admissions prior to his statements before the immigration boards. But just as in selective service cases turning on the sincerity of claims to conscientious objection, it would be "pure naivety" to expect general or public admission of improper inner motivation. *Witmer* v. *United States,* 348 U. S. 375, 383. The evidence is uncontroverted that petitioner's mother informed him at an early age of his birth in the United States and that he desired, thereafter, to return to the United States (*supra,* p. 4); that he knew enough about the United States

even then to know its facilities for affording him better technical education (*supra,* p. 4); that he became 18 years of age in 1942 but returned to the United States only in 1946, after the war was over. The court was not required to brush aside all this, as well as petitioner's three-times enunciated admissions before the immigration authorities, in order to accept the astounding and implausible assertion that, although workers coming across the border concededly brought news of the war in 1946, petitioner had not known, in 1942 or at any time before the same year of 1946, of so momentous and catastrophic a fact as that the United States was engaged in World War II (*supra,* p. 8).

Knauer v. *United States,* 328 U. S. 654, is a denaturalization case in this Court applying the strictest standard of proof. The holding there was that the course of conduct disclosed that Knauer's state of mind when he foreswore allegiance to Hitler and Germany was actually fraudulent—that he was still loyal to them (328 U. S. at 669). The Court relied, as did the District Court in the instant case, upon objective facts—the character of the evidence, the veracity of witnesses as determined by the District Court, the corroboration of challenged evidence, and "the consistent pattern" of conduct (328 U. S. at 660), even though it was conceded by the Court that "[i]f isolated parts of the evidence against Knauer were separately considered, they might

well carry different inferences" (328 U. S. at 667). In *Knauer*, as here, it was observed that the claimant of citizenship was an astute person (328 U. S. at 669), making more necessary the ascertainment of the truth from the course of conduct as well as a careful evaluation of the particular individual.[7]

B. Petitioner cannot fairly claim that his mother's influence, after he had grown up, amounted to duress excusing his remaining abroad. During the war, many parents feared their sons' entry into the armed forces and some even tried to prevent enlistment or acquiescence in the draft. But persuasion or influence of this type cannot be used, except possibly in the most extraordinary cases, as the excuse for characterizing as "involuntary" the son's refusal to perform his duty. Once the young man attains the age which subjects him to service, he has full capacity in the eyes of the law for that particular purpose. As this Court observed in *Savorgnan* v. *United States*, 338 U. S. 491, 502, distinguishing cases of "real duress":—"'* * * the forsaking of American citizenship, even in a difficult situa-

[7] For lower court cases upholding expatriation on disputed evidence, see *e. g.*, *Acheson* v. *Mariko Kuniyuki*, 189 F. 2d 741 (C. A. 9), certiorari denied, 342 U. S. 942; *Coumas* v. *Brownell*, 222 F. 2d 331 (C. A. 9); *Scavone* v. *Acheson*, 103 F. Supp. 59 (S. D. N. Y.); *Kazdy-Reich* v. *Marshall*, 88 F. Supp. 787 (D. D. C.); *Cantoni* v. *Acheson*, 88 F. Supp. 576 (N. D. Cal.); *Bruni* v. *Dulles*, 121 F. Supp. 601 (D. D. C.).

tion, as a matter of expediency, with attempted excuse of such conduct later when crass material considerations suggest that course, is not duress.' *Doreau* v. *Marshall*, 170 F. 2d 721, 724 (C. A. 3) * * *."[8]

C. In his petition (Pet. 6–7), but not in his brief on the merits, petitioner summarily contends that his testimony in the administrative proceedings, concededly admissible in the District Court trial, is valid only for purposes of impeachment and cannot constitute substantive evidence warranting the trial court's findings. The point confuses a party's prior admissions with statements made outside of court by a witness not appearing in court; the common objections to the latter type of statement are not applicable to a party's sworn admissions. First, the absence of opportunity for cross-examination when the statements were made is of no significance when the statements are those of the party himself; he would not need to cross-examine himself. Secondly, the statements here were made under oath (although even that would not be necessary in the case of the same party

[8] In recent years, there have been many cases of "real duress" decided by the lower courts. *E. g.*, *Dos Reis* v. *Nicolls*, 161 F. 2d 860 (C. A. 1), cited at Pet. Br. 8, 2[illegible] (choice of conscription into the Portuguese Army or detention in a concentration camp); *Acheson* v. *Murakami*, 176 F. 2d 953 (C. A. 9) (renunciation of citizenship by Japanese-Americans at certain war relocation centers); *Acheson* v. *Maenza*, 202 F. 2d 453 (C. A. D. C.) (compulsion to service in army of Fascist Italy); *Augello* v. *Dulles*, 220 F. 2d 344 (C. A. 2) (same).

later testifying under oath at the trial). As stated by Wigmore (Evidence (3d ed.) § 1048):

> * * * The probative value, therefore, of the use of admissions is two-fold:
>
> In the first place, all admissions may furnish, as against the opponent [party], the same discrediting inference as that which may be made against a witness in consequence of a prior self-contradiction * * *. In the next place, all admissions, used against the opponent, satisfy the Hearsay rule, and, when once in, have such testimonial value as belongs to any testimonial assertion under the circumstances; and the more notably they run counter to the natural bias or interest of the party when made, the more credible they become; this element adding to their probative value, but not being essential to their admissibility.
>
> This double evidential utility explains the proposition, sometimes judicially sanctioned, that an admission is equivalent to affirmative testimony * * *.

In the careful analysis of the American Law Institute, *Model Code of Evidence* (1942), it is likewise stated that the common law rule permits evidence of a hearsay statement against a declarant who is a party to the action, and that (p. 245):

> While a few *dicta* may be found to the effect that an admission is receivable only as impeaching evidence, *the decisions* are *almost unanimous* that it is admissible also

as *tending to prove* the truth of the matter stated in it. [Emphasis added.]

The issue was clearly posed and squarely decided in an earlier immigration case, *Schoeps* v. *Carmichael,* 177 F. 2d 391 (C. A. 9), certiorari denied, 339 U. S. 914. There, as here, prior statements before the immigration authorities were later denied. The statements were accepted by the court as "substantive evidence" (177 F. 2d at 397–398). See also: *Wong Ken Foon* v. *Brownell,* 218 F. 2d 444, 446 (C. A. 9) (prior admissions in citizenship case); *Miles* v. *United States,* 103 U. S. 304, 308–309, 311, admissions of defendant "to prove the fact" of his first marriage; *State Farm Mut. Auto. Ins. Co.* v. *Porter,* 186 F. 2d 834, 842–843 (C. A. 9), admissions that car involved in accident was driven with owner's permission; *Warde* v. *United States,* 158 F. 2d 651 (C. A. D. C.), testimony at previous trial admissible against defendant in prosecution for gaming as it had "tendency to establish his guilt" (p. 651); *Hardy* v. *Commissioner of Internal Revenue,* 125 F. 2d 863, 865 (C. A. 9), statements of taxpayer in a prior separate maintenance proceeding constituted substantive evidence before Board of Tax Appeals that a certain agreement was not abrogated; *Milton* v. *United States,* 110 F. 2d 556, 560 (C. A. D. C.), transcript of defendant's testimony in earlier housebreaking trial held admissible in forgery trial and of "probative value"; *Harrison* v. *United States,* 42 F. 2d 736, 737 (C. A. 10), answer to question as to

service-incurred disability held "substantive evidence" in later suit of declarant claiming disability.[9]

II

On the findings of the courts below, petitioner was expatriated under Section 401 (j) of the Nationality Act of 1940 (as amended)

A. *The Act applies to draft-evaders remaining abroad as well as those who left the country.* Petitioner presents a new argument, not developed below or presented in his petition for certiorari, to the effect that the Section 401 (j) does not relate to a person who stayed away from the United States to evade the draft, as distinguished from one who was present in the United States and left for the purpose of evasion (Pet. Br. 20–25).

The argument is clearly and fully foreclosed by the statutory language, which specifically desig-

[9] Petitioner does not suggest that his earlier testimony would require corroboration, for the rule in criminal cases is not applicable to this civil proceeding. 7 Wigmore, *Evidence* (3d ed.) § 2075, p. 406; 4 *Id.* § 1055. Moreover, if the requirement of corroboration were held to apply, ample corroboration would be established by the testimony at the trial, within the standards recently clarified by this Court in *Opper* v. *United States*, 348 U. S. 84, 93. Petitioner's testimony under oath at the trial clearly corroborated the earlier admissions as to the fact of his basic desire to return to the United States (*supra*, pp. 4, 8), the fact that workers from the United States brought news of the United States to petitioner's farm at least at the later time admitted by petitioner at the trial (*supra*, p. 8), the fact that influential conversations with his mother actually occurred (*supra*, pp. 7–8), and the date of his return in 1946 after hostilities had ended.

nates persons "departing from *or remaining* outside of the jurisdiction" (*supra*, p. 3; emphasis added). Petitioner attempts to support his contention by some more or less informal utterances in debate at the time of the enactment of the provision. These remarks stressed, as was natural, the more superficially striking examples in which draft-evaders actually fled the United States (Pet. Br. 20–22). However, the language of the statute, employing the disjunctive "or," is clearly broader and furnishes the complete answer to the argument. Nor does petitioner present a single instance in which the legislators sought to restrict the proposal to the particular examples of which they were speaking, or to deny its application to anyone who remained beyond the United States in order to evade service.

There is no basis in reason for the suggested distinction between persons who are alike in having a purpose to evade their duty to their country and who are equally successful in doing so. There is no significant difference between the American who departs to avoid service and he who, happening to live abroad, deliberately remains there for the same purpose. While petitioner's is not the picturesque case of one fleeing the United States,[10] it is the case of one who was

[10] For the Court's information, we may point out that, by stipulation of counsel at the trial, the case of the *amicus curiae*, Francisco Mendoza-Martinez, does squarely present the case of a native-born American who registered for the draft in the United States (in 1940) and then departed for

aware of his United States nationality and made a clear and affirmative change his action in order to evade the draft. He intended to return to the United States (*supra*, pp. 4–7) but refrained from doing so until after the war (*supra*, pp. 4–7, 8). He thereby deprived the United States of his services as effectively and as willfully as an evader who, by reason of the accident of location, commenced his draft-dodging in the United States and then fled the country. In each instance, the significant element is not that the offender was recently in the United States but that he spurned his duty to protect his country, chose the safety of another land, remained away from the reach of criminal punishment, and created international problems as a draft-evading citizen residing in a foreign country.

B. *The Executive Agreement of January 22, 1943, did not remove petitioner from the coverage of the Act.* Another belated contention (not raised below or presented in the petition) is that the Executive Agreement of January 22, 1943 (E. A. S. 323, 57 Stat. 973), between the United States and Mexico, relating to nationals of either nation in the armed forces of the other, somehow indicates that one who registered for military service in Mexico cannot be considered an evader of United States military service within the pro-

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Mexico (in 1942) in order to avoid service in the armed forces. The *Mendoza-Martinez* case is now on appeal to the Court of Appeals for the Ninth Circuit.

visions of Section 401 (j). Petitioner testified briefly that he registered for military service in Mexico in 1942 (R. 16), but the circumstances were not developed since this point was not raised below.

1. The short answer is that the Agreement is irrelevant to the question of the duty *to the United States* of an American citizen resident in Mexico. It is an agreement establishing the relationships *of the two countries* with respect to military service by the nationals of the one in the armed forces of the other, and it has nothing whatsoever to do with the duties of the nationals themselves to their respective countries.[11] Thus,

[11] The text of the operative paragraphs of the Agreement is as follows (57 Stat. 973, 975–976):

"I. The nationals of either country resident within the territory of the other may be registered and inducted into the armed forces of the country of their residence on the same conditions as the nationals thereof unless otherwise provided herein.

"II. Nationals of either country residing in the other shall be accorded the same rights and privileges as nationals of the country of residence. In the selection and induction into their armed forces of nationals of the other country the authorities of the respective countries shall take into account on the same basis as if their own nationals were involved the physical condition and health of the individuals concerned, their civil status, their financial dependents, regardless of the place of residence and any other circumstances which under the laws and regulations in force in the country of residence would apply in selecting and inducting nationals of the latter country.

"III. Nationals of either country in the territory of the other country for purposes of study and with the intention of returning to the country of which they are nationals upon

the first paragraph permits the induction of residents, the second and seventh paragraphs provide that such inductees have rights comparable to nationals of the country, the third and fifth paragraphs exempt temporarily-resident students and government officials from induction, the fourth paragraph provides that "border crossers" shall be considered residents where they "actually live", the sixth provides for interchange of information between the two governments, and the eighth paragraph permits the governments to assist in the welfare of their respective nationals.

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the termination of such study shall upon establishing such facts in accordance with existing selective service laws and regulations be relieved from the obligation of military service.

"IV. Nationals of either country who under the immigration laws of the other country are technical residents of that country known as 'border crossers' shall for military service purposes be considered residents of the country in which they actually live.

"V. Officials and employees of either country residing in the other whose official status has been notified to the Government of the country in which they are residing and accepted by that Government shall not be considered for military service purposes as residents of the country in which they are residing.

"VI. Each Government in so far as necessities imposed by the war effort permit will furnish the other Government with information concerning its nationals who have registered for or been inducted into the military service.

"VII. Nationals of either country serving in the armed forces of the other country shall receive the same treatment and have equal opportunities with respect to commissions, promotions and other incidents of military service as are

In the context of this Agreement as a whole, the ninth paragraph, so extensively relied upon by petitioner (Pet. Br. 23–25), appears in its proper significance as a mere optional means of releasing inductees of one country upon request of the other country. The provision, in full, is as follows:

> IX. Nationals of each country who have been registered for or inducted into the Army of the other country in accordance with the military service laws of the latter and who have not declared their intention to acquire the citizenship of the country

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accorded by that country in conformity with military law and practice to its nationals.

"VIII. Representatives of either Government shall have the right to assist their nationals serving in the military forces of the other in all matters relating to their welfare including but not limited to the payment of pensions, gratuities, indemnities or other benefits to them or their dependents wherever the latter may be resident.

"IX. Nationals of each country who have been registered for or inducted into the Army of the other country in accordance with the military service laws of the latter and who have not declared their intention to acquire the citizenship of the country in which they reside shall upon being designated by the country of which they are nationals and with their consent be released for military service in its forces provided that this has no prejudicial effect on the common war effort. The procedure for the transportation and turning over of these persons will be agreed upon by the appropriate authorities of the two countries who are empowered to bring about the objectives desired.

"X. The understandings in the foregoing arrangement shall be in effect as of today for the duration of the present war and six months thereafter."

> in which they reside shall upon being designated by the country of which they are nationals and with their consent be released for military service in its forces provided that this has no prejudicial effect on the common war effort. The procedure for the transportation and turning over of these persons will be agreed upon by the appropriate authorities of the two countries who are empowered to bring about the objectives desired.

In no sense do the terms of this paragraph absolve any national from his duty to his country—his duty, at the very least, to register when called upon to do so, and to return, if so ordered. The arrangement is solely between the United States and Mexico, and individuals are granted no exception from the selective service laws.

Moreover, the paragraph and the whole Agreement are to be read in their setting. In January 1943, when the Agreement was executed, the United States was not yet designating its nationals for return to our military forces, although paragraph IX clearly contemplated that prospect. Nor was the requirement of registration for selective service generally applicable to residents abroad. The basic selective service legislation left these steps to presidential proclamation. Within the year of the Executive Agreement, however, on October 26, 1943, a presidential proclamation provided (Proclamation 2597, 8 F. R. 14595) for registration of non-resident nationals from

ages 18 through 45 before specified officers, including diplomatic or consular officers. Petitioner's statement that the proclamation made "no requirement for returning to the United States" (Pet. Br. 23) embodies the erroneous implication that the registration requirement was a meaningless gesture. The contrary was true. The selective service board established under the proclamation proceeded into active functioning, and many non-residents were called into service, as petitioner might have been called had he registered as required. The proclamation made no exception with respect to persons registered with a foreign military force, nor did it require their consent; also, no such exemptions appear in the regulations implementing the proclamation (see Selective Service System, *Local Board Memorandum No. 189,* issued Feb. 9, 1944).

Even assuming *arguendo* that the Executive Agreement's ninth paragraph, *supra,* pp. 31–32, may possibly have given an indirect means of escape from United States military service to a United States national by permitting him to withhold consent to his release from Mexican service, the duty to register under the United States selective service law existed regardless of consent, after the issuance of the Proclamation of October 26, 1943. Under no theory was petitioner excused from his minimum duty in that respect. Whatever may have been the effect of Mexican registration if petitioner acted in accordance with his

known duty under American law to register for selective service, the fact is that, in order to evade the draft, he did not make himself known to the United States selective service authorities. No possible reading of the Executive Agreement can make that action lawful. Nor can the failure to register be deemed immaterial. If an American national evaded his duty to register, the United States Government would not be in a position to exercise its rights under the Executive Agreement even to attempt to have the national withdrawn from Mexican service.

2. Significantly, upon the enactment in 1944 of Section 401 (j), expatriating draft-evaders remaining outside the United States, no exception was made expressly or impliedly indicating that any American national was to be excused from the effect of draft evasion because of registration for foreign service (even a registration permitted or countenanced by our laws). Moreover, Congress spoke of a purpose of "evading" *or* "avoiding" American military service, thus emphasizing its design to expatriate all those whose goal was not to serve this country.

In contrast, another provision of the same expatriation section of the Nationality Act expressly provided an exception—comparable to the one petitioner urges be read into Section 401 (j)—for foreign service authorized by our laws. Subsection (c) of Section 401 provided for expatriation for a dual national (*infra*, p. 65):

> Entering, or serving in, the armed forces of a foreign state *unless expressly authorized by the laws of the United States* * * *. [Emphasis added.] [12]

The Congress thereby provided for an exception *in advance* of such agreements as the one here adduced. It is the more clear that there was no intent to make a similar exception under subsection (j), when it is recognized, not only that subsection (j) contains no such specific language of exception, but also that it was not enacted until 1944 *after* the execution of the Executive Agreement in question.

Of course, if there were a conflict between the Executive Agreement and Section 401 (j), the latter would control. *Moser* v. *United States,* 341 U. S. 41, 45; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 720. But it is unnecessary to posit a clash. Statute and agreement can be read harmoniously. As shown above, the Agreement does not affect the individual obligations and duties toward this country of American citizens in Mex-

[12] In the discussion concerning this provision, by the Secretary of State, the Attorney General, and the Secretary of Labor, it was pointed out that "[t]he words 'unless expressly authorized by the laws of the United States would relate not only to statutes * * * but also to conventions such as those concluded during the World War * * * under which either party was allowed to draft, under certain conditions, persons having the nationality of the other * * *". Hearings before the House Committee on Immigration and Naturalization, 76th Cong., 1st Sess., on H. R. 6127 superseded by H. R. 9980, p. 490. And see Roche, *Loss of American Nationality*, 99 U. of Pa. L. Rev. 25, 50.

ico (*supra*, pp. 29–34); conversely, the Act covers all those who remain abroad for the specific purpose of *avoiding* American military service (as well as those who actually *evade* their legal obligations). Petitioner's continued absence from this country, during World War II, was never ascribed to military service in Mexico or to his desire to fulfill that obligation, but to the aversion that he and his mother both felt to military service in war time when he might be injured or killed. He did not fail to register with the American authorities because he believed that he was not required to register or that his Mexican registration was sufficient. Admittedly, he knew of his duty to register under our laws; he did not do so because he did not want to come to the United States and to serve in our forces. *Supra*, pp. 4–7, 8. In short, under his own testimony and the facts found by the trial judge, petitioner falls squarely within Section 401 (j) and the Executive Agreement furnishes him with no excuse.

C. *Section 401 (j) covers draft-evaders under 21 years of age.*

Petitioner suggests (Pet. Br. 30–31) that Section 401 (j) could not apply before July 21, 1945, when he became 21.[13] On the contrary, we believe that Section 401 (j) governs all persons, including those under 21, who were subject to selective service requirements. During World War II,

[13] This is another issue which was not raised below or presented in the petition for certiorari.

these requirements applied to men over 18 (Proclamation 2597, 8 F. R. 14595) and, as pointed out above, they were extended to Americans resident abroad on October 26, 1943 (*supra*, pp. 32–33).

The problem arises because of the structure of the expatriation provisions of the 1940 Act. Section 401 of the Nationality Act of 1940, 8 U. S. C. 801, provided for 10 methods of expatriation, lettered (a) to (j) respectively.[14] Section 403 (b) (8 U. S. C. 803 (b)) then provided (*infra*, p. 66):

> No national under eighteen years of age can expatriate himself under subsections (b) to (g), inclusive, of section 401.

Since subsection (j) is not enumerated in Section 403 (b), there is no numerical textual determination of the age at which that subsection governs. Section 403 (b) is phrased in the negative, not as lowering an extraneous age limit which would otherwise control, but as itself establishing a minimum age to rule the cases to which it applies. Nevertheless, it has been suggested that, outside of the purview of Section 403 (b), the civil age of consent—21 years—is the applicable age. Cf. *McGrath* v. *Abo*, 186 F. 2d 766 (C. A. 9), certiorari denied, 342 U. S. 832.

In our view, however, the proper answer is supplied by the historical development of Ameri-

[14] Subsections (a)–(h) were contained in the Nationality Act of 1940, as originally enacted. Subsection (g) was amended by the Act of January 20, 1944, 58 Stat. 4. Subsections (i) and (j) were added by the Acts of July 1, and September 27, 1944, 58 Stat. 677 and 746, respectively. See *infra*, pp. 64–66.

can nationality legislation which, based as it is on the doctrines of fealty and allegiance, has now created its own standards of capacity independent of the principles generally governing the civil disabilities of minors. Cf. III Hackworth, *Digest of International Law*, 271.[15] Prior to the enactment of the Nationality Act of 1940, the courts were in conflict whether the 21 year age limit applied to political capacity with respect to expatriation. *Baglivo* v. *Day*, 28 F. 2d 44 (S. D. N. Y.), held that it did, but *In re Wittus*, 47 F. 2d 652 (E. D. Mich.), came to the opposite result. In *Perkins* v. *Elg*, 307 U. S. 325, this Court was confronted with the question whether a child born here of naturalized American citizens lost her American citizenship upon removal during her minority to Sweden where her parents resumed their original citizenship. In the discussion of this problem, Chief Justice Hughes stated at p. 334:

> To cause a loss of citizenship * * * there must be voluntary action and such action cannot be attributed to an infant whose removal to another country is beyond his

[15] The fact that a person under the age of 21 lacks full *contractual* capacity does not mean that the law considers him incompetent for all purposes until he reaches that age. The law permits a minor to make many binding decisions, some of which have far more serious consequences than simple contracts. Cf. 5 Vernier, *American Family Laws*, § 282 And minors can, of course, be guilty of criminal offenses.

> control and who during minority is incapable of a binding choice.[16]

In the *Abo* case, the court failed to recognize the limited scope of this statement, and read it as holding generally that a minor could not renounce citizenship in the absence of an express statutory authorization. But Chief Justice Hughes was speaking of an infant for whom an election of nationality had been made by someone else, not of a person over eighteen years considered by the law as capable of doing many things and who had taken significant action himself. The Court was also speaking at a time when the nationality laws did not indicate that Congress viewed minors as capable of expatriation.

In the Nationality Act of 1940, enacted some 18 months after the decision in the *Elg* case, Congress established 18 as the general age of discretion in nationality matters. The cabinet committee report[17] which first set forth the 18-year

[16] Miss Elg was four years of age when her parents took her to Sweden (307 U. S., at 327).

[17] The groundwork for this legislation was laid by an interagency committee appointed by the President by Executive Order No. 6115 of April 25, 1933 (Hearings before the Committee on Immigration and Naturalization, House of Representatives, 76th Congress, First Session, on H. R. 6127 superseded by H. R. 9980 (hereinafter referred to as "Hearings"), p. 407). The Committee, composed of the Secretaries of State and Labor and the Attorney General, submitted a proposed codification of the nationality laws of the United States which was transmitted by the President to Congress on June 13, 1938 (Hearings, p. 406). This proposed code, amended after extended hearings, became the Nationality Act of 1940.

limit on expatriation [18] contained the following explanatory comment: [19]

> The reasons for adopting this provision are obvious. It does not seem reasonable that an immature person should expatriate himself by any act of his own. [Citing authorities.] It will be observed that in this subsection the age below which a person cannot expatriate himself is set at 18 years instead of 21 years. *It is believed that a person who has reached the age of 18 should be able to appreciate fully the seriousness of any act of expatriation on his part.* * * * [Emphasis added.]

Congress retained this 18-year limit in spite of repeated attempts to raise it to 21.[20] Morover, Sections 314, 315, 316, and 331 of the Nationality Act of 1940 show that Congress generally considered the age of 18 as the age at which a person is sufficiently mature to make a binding decision concerning his nationality. The 21-year standard plays no part in the statutory scheme.

Thus, the failure of Section 403 (b) to refer to subsections 401 (a), (h), (i), and (j) does not mean that these methods of expatriation presuppose majority. A reference to Section 401 (a) (*infra*, pp. 64–65) was probably omitted because that provision contains its own age limit in the case of a person naturalized abroad by the naturalization

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[18] Hearings, p. 492.

[19] Hearings, pp. 492–493.

[20] Hearings, pp. 289, 388, 398.

of a parent, as well as in order to avoid the creation of dual nationality in the event that another country should permit a person to become naturalized on his own petition at a younger age than 18. Subsections (h) and (j) (*infra*, p. 66) presuppose capacity to commit treason and liability to the draft, respectively, and Congress must have intended to incorporate, by reference, the age requirements applicable to commission of the crime of treason, and to selection for the draft.[21]

In *McGrath* v. *Abo, supra,* the Ninth Circuit held the minimum age for renunciation of citizenship under Section 401 (i) (*infra*, p. 66) was 21 years. We challenged that ruling at the time (by a conditional cross-petition for certiorari) and there is much to be said against it even as applied to renunciations under Section 401 (i). But the provision now before the Court—Section 401 (j)—is quite different, and the *Abo* ruling, even if it be accepted, is not decisive. As we have suggested, Section 401 (j) plainly incorporates the age requirement applicable to selective service. Whenever a young man attained the age which made him subject to "training and service" in the armed forces—in a particular war or during a particular period of national emergency—he also

[21] The failure to include 401 (i) (*infra*, p. 66)—enacted in order to permit renunciation of citizenship by Japanese-Americans interned in relocation centers—in 403 (b) was probably a mere oversight. When subsection (i) was added to Section 401, Congress apparently forgot to amend Section 403 (b) accordingly.

became automatically subject to the provisions of Section 401 (j).

III

Congress has the constitutional power to provide for the loss of United States nationality by citizens who, in time of war, voluntarily remain outside the jurisdiction of the United States to evade or avoid military service

Petitioner's contention that the power of Congress to expatriate is restricted to mere recognition of a citizen's own choice of a new allegiance (Pet. 29–34; Pet. Br. 6–18) disregards the whole course of responsible judicial decision on the subject of loss of nationality. This Court has consistently held that the power to fix the conditions for loss of nationality is an attribute of sovereignty which may be reasonably exercised on the basis of national need. While the particular act upon which expatriation rests must be a voluntary one, the courts have held that the person voluntarily committing the expatriating act need not, at the time, have the subjective intent to expatriate himself, *i. e.*, to choose another allegiance over that of this country. If he freely does the act which Congress has specified as a basis for loss of nationality, and if that act has reasonably been found by Congress to be a basis for expatriation, then the doing of the act results in loss of his American nationality, whatever the internal feeling of the doer as to his allegiance.

These settled principles establish the constitutionality of Section 401 (j).[22] There is a national need for dealing with draft evaders who remain outside the jurisdiction of the United States and thus outside the reach of ordinary criminal sanctions. As early as 1865, Congress provided for forfeiture of the rights of citizenship upon failure of deserters to return to the armed forces, or upon departure of enrolled draftees from their district or from the United States with intent to avoid draft into the armed forces. Act of March 3, 1865, Sec. 21, 13 Stat. 490. This statute remained in effect until repealed by the Nationality Act of 1940, and was soon reinstated, in effect, by the provision here involved, which was passed in 1944. See *infra*, pp. 58–61. Such evaders pose a problem in the nation's international relations by retaining rights to treatment as United States citizens in foreign countries at a time when they are unwilling to fulfill the obligations of citizenship. Thus, the prescribing of loss of nationality under the conditions specified in Section 401 (j) is a matter of "national moment" within the constitutional powers of Congress (see *Mackenzie* v. *Hare*, 239 U. S. 299, 312).

[22] We note that *amicus curiae* Francisco Mendoza-Martinez, whose expatriation case is now pending in the Court of Appeals for the Ninth Circuit, has raised in his case only the issue of the validity of Section 401 (j). He stipulated in the District Court "all operative facts necessary to the application of 401 (j)" of the Nationality Act of 1940. See his *Amicus Curiae* Brief, p. 2, and footnote 10, *supra*, p. 27.

A. *The power to expatriate is an implied attribute of sovereignty and is not restricted to instances where the citizen desires to give up his American nationality.*

The main burden of the arguments of both petitioner and of *amicus curiae* Mendoza-Martinez is that Congress cannot impose expatriation upon an American who does not desire to give up his citizenship or does not consent to his loss of nationality. This erroneous conclusion is thought to follow from the citizenship provision of Section 1 of the Fourteenth Amendment, as well as from the absence from the list of Congressional powers, in Article I, Section 8, of any reference to expatriation.

1. The argument that the Congressional power to expatriate is necessarily hobbled because it is not expressly spelled out in the Constitution was long ago answered by this Court in *Mackenzie* v. *Hare,* 239 U. S. 299, upholding the validity of the statutory expatriation (34 Stat. 1228, c. 2534) of a native-born woman upon her marrying an alien, even though she had no specific intent to expatriate herself and never left the United States. The Court said (239 U. S. at 311):

> But there may be powers implied, necessary or incidental to the expressed powers. As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and

> intercourse with other countries. We should hesitate long before limiting or embarrassing such powers.

This doctrine of implied powers in the field of foreign relations is, of course, one of long standing and great breadth. See *e. g. United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 318. As applied to the power of the United States, as a nation, to fix the conditions which will result in loss of nationality, it has not seriously been questioned since *Mackenzie.* It was assumed in *Savorgnan* v. *United States,* 338 U. S. 491, in which the Court upheld the statutory expatriation of a native-born citizen as against her contention that she did not intend to renounce her citizenship by obtaining Italian citizenship while in the United States and then residing abroad. In *Perkins* v. *Elg,* 307 U. S. 325, the Court, in sustaining a claim of retention of citizenship, recognized the power to expatriate, stating (307 U. S. at 329):

> [C]itizenship [at birth] must be deemed to continue unless she has been deprived of it through the operation of a treaty *or congressional enactment* or by her voluntary action in conformity with applicable legal principles. [Emphasis added.]

See, also, *Kawakita* v. *United States,* 343 U. S. 717, 722–731; *Mandoli* v. *Acheson,* 344 U. S. 133.

The lower courts have taken the same view of the inherent power to expatriate. *Lapides* v. *Clark,* 176

Americans, freed from all legal ties, duties, or allegiance to the states of their original citizenship. See *Savorgnan* v. *United States*, 338 U. S. 491, 497–499; *Mandoli* v. *Acheson*, 344 U. S. 133, 135–6.[24]

But Congress has also been increasingly concerned with the other side of the coin—with removing from the body of our citizenship those Americans who, by their voluntary acts, have shown that they should no longer be citizens of this country even if they desire to remain such. During the Civil War Congress forfeited the "rights of citizenship" of deserters and draft-evaders,[25] and in the Citizenship Act of 1907, 34 Stat. 1228, Congress enacted general legislation imposing expatriation on Americans who perform various types of acts. From 1940 to 1952, the expatriation provisions were set forth in Section 401 of the Nationality Act of 1940 (*infra*, pp. 64–66); since December 1952,

[24] The development of the general American doctrine of expatriation, with its vicissitudes before the 1850's, is described in III Moore, *Digest of International Law*, Secs. 431–469; III Hackworth, *Digest of International Law*, *Secs.* 242–250; II Hyde, *International Law Chiefly as Interpreted and Applied in the United States* (1945 ed.), Secs. 376–387A; Moore, *The Principles of American Diplomacy*, ch. VII, reported in IV *Collected Papers of John Bassett Moore*, pp. 388–406; Flournoy, *Naturalization and Expatriation* (1922), 31 Yale L. J. 702, 848; Tsiang, *The Question of Expatriation in America prior to 1907* (1942), Johns Hopkins University Studies in Historical and Political Science, Series LX, No. 3; Brief for the Petitioners, pp. 20–27, in *Perkins* v. *Elg*, Oct. Term, 1938, No. 454.

[25] This statute is discussed in detail, *infra*, pp. 58–60.

the controlling provisions have been those of Sections 349–357 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U. S. C. 1481–1489.[26]

In applying and sustaining these provisions for compulsory expatriation, the courts have established that the power of Congress is not restricted merely to recognizing the intent of the citizen to renounce his American nationality. Most of the acts specified by Congress for expatriation are objective, and it is immaterial that the person may desire and intend to retain his citizenship in this country. As noted above (*supra,* p. 44), in the foundation case of *Mackenzie* v. *Hare,* 239 U. S. 299, the Court held that a woman lost United States nationality by marriage to a foreigner even though she did not intend to renounce her citizenship. The loss of citizenship was the result of her voluntary act in marrying the alien. As the Court said, 239 U. S. at 312, her act was "as voluntary and distinctive as expatriation and its consequence must be considered as elected."

In *Savorgnan* v. *United States,* 338 U. S. 491, the Court expressly ruled that the subjective intent of the citizen not to lose United States nationality could not overcome the effect of her

[26] The Act of July 27, 1868, 15 Stat. 223, Rev. Stat. § 1999, 8 U. S. C. 800, gave legislative recognition to the "right of expatriation" as a "natural and inherent right of all people," but did not define what constituted expatriation. Until the 1907 Act was adopted, there was no general Congressional measure prescribing specific modes in which expatriation could be effected—aside from the deserter and draft-evader statute.

voluntary action in acquiring Italian nationality. It characterized the expatriating act as objective (338 U. S. at 497, 499) and declared, at p. 500:

> There is nothing, however, in the Act of 1907 that implies a congressional intent that, after an American citizen has performed an overt act which spells expatriation under the wording of the statute, he, nevertheless, can preserve for himself a duality of citizenship by showing his intent or understanding to have been contrary to the usual legal consequences of such an act.

And in a footnote the Court further observed (338 U. S. at 501):

> In § 401 of the Act of 1940, Congress added a number of *per se* acts of expatriation. These included, among others, entering the armed forces of a foreign state, accepting office in a foreign state to which only nationals of such state were eligible, and voting in a political election of a foreign state. Lack of intent to abandon American citizenship certainly could not offset any of these. * * *

In *Kawakita* v. *United States,* 343 U. S. 717, 721–730, the Court and both parties assumed that Kawakita would have been expatriated if he had committed one of the statutory acts of expatriation, regardless of the jury's finding that he never intended to renounce American citizenship (see p. 732). Similarly, in *Mandoli* v. *Acheson,* 344 U. S. 133, it was immaterial whether Mandoli thought he was an American or an Italian.

In the earlier lower court case of *Ex parte iffin*, 237 Fed. 445, 453 (N. D. N. Y.), it was d: "If it be the natural and inherent right a citizen to expatriate himself or herself, it uld seem that the government should have the ht to declare that the doing of acts by the zen which are inconsistent with the discharge his duties as such citizen to his government, ompanied by a departure from its jurisdiction, stitute expatriation—abandonment and renun- tion of citizenship." See also *Revedin* v. *heson*, 194 F. 2d 482, 484 (C. A. 2), certiorari ied, 344 U. S. 820 ("She cannot escape [the visions'] effect merely because she did not in- d to be bound by them or because she kept rself insulated from the significance of free l conscious acts for which she must be held ponsible"); *Acheson* v. *Wohlmuth*, 196 F. 2d , 871 (C. A. D. C.), certiorari denied, 344 U. S. ("A person cannot avoid the consequences ich Congress has attached to his overt acts by iming ignorance of the law or a contrary in- tion on his own part * * *"). The other es cited *supra*, pp. 45–46, 22 (fn. 7), have also eld the loss of nationality by the doing of speci- acts, regardless of the subjective purpose or ent of the citizen."

The Government has heretofore urged that the acts of atriation listed in Section 401 of the Nationality Act of are the exclusive means of losing American nationality. Brief for the United States, *Kawakita* v. *United States*, 570, Oct. Term, 1951, at pp. 38–44, and Brief for the

Petitioner lays great stress (Pet. Br. 12–14) upon a series of rulings by Chief Judge McLaughlin in the District Court for the District of Hawaii, voiding provisions (subsections (c), (d), and (e)) of Section 401 of the Nationality Act of 1940, *infra*, p. 65) which expatriate Americans who serve in the army of another nation of which they are also nationals, accept office in such a nation, or vote in foreign political elections. The government appealed the first two of these decisions (*Kiyokuro Okimura* v. *Acheson*, 99 F. Supp. 587, and *Hisao Murata* v. *Acheson*, 99 F. Supp. 591), but this Court remanded (342 U. S. 899, 900) for findings as to the circumstances under which the claimed citizens had performed their services in the Japanese army or voted in Japanese elections. Upon remand, the judge, while finding no "legal duress", made clear findings of outright compulsion. 111 F. Supp. 303, 306. Since these findings of coercion were entirely comparable to findings made in a large number of other Japanese-American expatriation cases in Hawaii and the federal District Courts on the West Coast which the government had not appealed, the govern-

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Respondent, *Mandoli* v. *Acheson*, No. 15, Oct. Term, 1952, at pp. 68–80, 86–88. The Court has found it unnecessary to pass upon this contention. See *Kawakita* v. *United States*, 343 U. S. 717, 730–732; *Mandoli* v. *Acheson*, 344 U. S. 133, 139. In reserving the question the Court, we assume, contemplated that there might be other means of exercising the *right* of expatriation by an individual who *did* desire to renounce his American allegiance.

ment sought no review of the ultimate holding in these two Hawaii cases that American citizenship had not been lost. Similarly, in the other cases in which Judge McLaughlin has invalidated provisions of Section 401, the government has not appealed to this Court because (a) in each instance the record or findings revealed duress or coercion or some other infirmity of the type which has led the other district judges trying this class of Japanese-American expatriation case to hold—without invalidating the statute—that expatriation did not occur;[28] and (b) the Ninth Circuit, which includes the District of Hawaii, has already sustained the validity of these provisions of the statute. See *Miranda* v. *Clark,* 180 F. 2d 257, 259 (C. A. 9); *Acheson* v. *Mariko Kuniyuki,* 189 F. 2d 741, 744 (C. A. 9), certiorari denied, 342 U. S. 942; opinion in the instant case, R. 36; *Vidales* v. *Brownell,* 217 F. 2d 136, 138 (C. A. 9).

3. Petitioner has misinterpreted decisions in which the courts have held that it was the intent of Congress that the expatriating act should be a voluntary one. *E. g., Perkins* v. *Elg,* 307 U. S. 325, 334; *Acheson* v. *Maenza,* 202 F. 2d 453, 457 (C. A. D. C.); *Dos Reis* v. *Nicolls,* 161 F. 2d 860 (C. A. 1); *supra,* pp. 22–23. An act may be done voluntarily, such as the marriage in *Macken-*

[28] The Government has generally not appealed these decisions when based on duress or a comparable nonconstitutional ground.

zie v. *Hare,* or the acquisition of Italian nationality in *Savorgnan,* or voting in a foreign election, without being accompanied by the subjective intent to renounce United States nationality. So here, if petitioner's staying out of the country to avoid military service were not his voluntary act, he would not be within Section 401 (j). See *supra,* pp. 22–23. But once he voluntarily stayed out of the country for the purpose of evading military service, it becomes immaterial whether or not he intended thereby to renounce his American citizenship or whether he even knew that his act would result in loss of American citizenship. As we have shown, it is the intentional doing of the act prescribed by Congress which results in the loss of nationality.

B. *There is a reasonable basis for prescribing loss of nationality for those who remain out of the country in order to evade military service.*

While the decisions discussed above make clear that Congress has the power to fix the conditions for loss of nationality regardless of the intent of the individual to renounce or give up his citizenship, it is plain that this power cannot be exercised arbitrarily or unreasonably. The important question in this case, therefore, is what are the considerations which must govern such action by Congress.

[78] The Government has generally not appealed these decisions when based on duress or a comparable non-constitutional ground.

1. It has been urged (see Pet. Br. 13) that, at most, Congress can condition the loss of nationality only upon acts which evince the actual acceptance of some other nationality, such as naturalization in a foreign state. But this is only one step removed from the argument that Congress can do no more than recognize the desire of a citizen to change nationality; it makes action by Congress dependent on an individual citizen's preference of nationality, although evidenced by acts rather than subjective declaration of intent. As stated above, we find in the decisions of the courts no such limitation on the authority of Congress to exercise the power inherent in sovereignty to determine what acts shall result in the loss of nationality. And while the actual statutes which have come before the courts have, for the most part, concerned situations involving some relationship to another country, it is significant that the courts, in upholding the statutes, have spoken, not in terms of the citizen's acceptance of some other nationality, but of the sovereign national need to determine questions which affect its international relations and its citizenship.

Here, too, the basic case is *Mackenzie* v. *Hare*, 239 U. S. 299, involving a woman's loss of nationality by marriage to a foreigner. (See *supra*, pp. 44–45, 49.) It is true that marriage had a past legal history—albeit a confused one—of relation-

ship to citizenship, but the Court sustained her expatriation, not so much because of that relationship as due to the national need to conduct international relations harmoniously. The Court said, at p. 316:

> [T]he legislation was urged by conditions of national moment. And this is an answer to the apprehension of counsel that our construction of the legislation will make every act, though lawful, as marriage, of course, is, a renunciation of citizenship. * * * This is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid but demanded. It is the conception of the legislation under review that such an act may bring the Government into embarrassments and, it may be, into controversies.

Thus, the Court considered the validity of expatriation dependent upon its relationship to "conditions of national moment," not upon its connection with the citizen's own choice of nationality.

Similarly, mere residence abroad for five years on the part of a naturalized citizen, particularly in a country not of his original allegiance, does not evidence an intent to adopt a nationality other than United States nationality. Yet the national interest opposed to prolonged stays abroad by citizens formerly bearing foreign allegiance was held to be a sufficient basis for sustaining the power of Congress to enact the provision. *Lapides* v.

Clark, 176 F. 2d 619, 620–621 (C. A. D. C.), certiorari denied, 338 U. S. 860 (*supra*, pp. 45–46).

Historically, then, the statutory acts of expatriation have included not only those which indicate choice of another allegiance over American, or an attachment to a foreign country which is necessarily inconsistent with American nationality. Lack of allegiance to or support of this country (whether or not preference for another nation is exhibited) is a significant factor, as are acts and situations which may lead to international embarassment or embroilment. The only generalization we would offer is that the act of expatriation must have such a close connection with the cardinal elements of American nationality and allegiance that it is reasonable, with due consideration for the "cherished status" of American citizenship (*Knauer* v. *United States*, 328 U. S. 654, 658), for Congress to impose loss of nationality as a result of the commission of the act.

2. By this standard, a statute prescribing expatriation for those who remain out of the country to avoid military service is a reasonable exercise of the power of Congress to fix the conditions which will result in loss of nationality. The problem of draft evaders who remain out of the country in a period of war or national emergency in order to avoid a fundamental obligation of citizenship—service in defense of the nation—is manifestly a serious one. It is rendered particularly grave by the fact that, in remaining out of the

country, such persons put themselves out of the reach of ordinary criminal sanctions which apply to draft evaders within the country. Moreover, these men present a problem in international relations since, so far as other countries are concerned, they remain United States citizens, while, so far as this nation is concerned, they have refused to fulfill the obligations of citizenship.

Ever since the Civil War, the United States has felt the need for legislation of this type. In 1865, even before the "right" to change nationality was spelled out in the Act of 1868,[29] Congress provided for forfeiture of the "right of citizenship" of deserters *and* enrolled draftees who departed from their district or from the United States with intent to avoid draft into the armed forces. Section 21 of the Act of March 3, 1865, 13 Stat. 490.[30] This statute

[29] As noted above (fn. 26, *supra*, p. 49), the Act of July 27, 1868, 15 Stat. 223, Rev. Stat. 1999, gave legislative recognition to the "right of expatriation" as a "natural and inherent right of all people", but did not define what constituted expatriation. It is interesting, though perhaps not too significant, that the 14th Amendment was declared by Congress to be a part of the Constitution on July 21, 1868, and officially promulgated by the Secretary of State on July 28, 1868, one day after enactment of the expatriation act.

[30] "* * * [A]ll persons who have deserted the military or naval services of the United States, who shall not return to said service, or report themselves to a provost-marshal within sixty days after the proclamation hereinafter mentioned, shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship and their rights to become citizens; and such deserters shall be forever incapable of holding any office of trust or profit under the United

apparently decreed loss of citizenship even if the evader did not leave the jurisdiction of the United States.

The constitutionality of this 1865 Act was squarely and extensively considered and its validity upheld in *Gotcheus* v. *Matheson,* 58 Barb. 152, 155–160 (reversed on other grounds, 61 N. Y. 420), the court relying upon the constitutional powers of Congress with respect to the armed forces (Const. Art 1, section 8, subd. 11 and 13). The validity of the Act and its effectiveness as an expatriation statute was assumed in utterances of this Court, of other courts, of Attorneys General, and of other administrative officials, dealing with questions under this legislation. See III Hackworth, *Digest of International Law* (1942), pp. 276–279; *Kurtz* v. *Moffitt,* 115 U. S. 487, 501 (in which the effectiveness of the forfeiture of citizenship of deserters was held dependent, apparently, only upon a court-martial's finding of the fact of desertion); *In re Carver,* 142 Fed. 623, 624 (C. C. D. Me.); *United States* v. *Snow,* 27 Fed. Cas. (No. 16,350) 1255, 1256 (E. D. Tenn.); *Cavender* v. *United States,* 8 C. Cls. 281, 282; *Citizenship of Grover Cleveland Bergdoll,* 39 Op. A. G. 303; *Holt* v.

States, or of exercising any rights of citizens thereof; and all persons who shall hereafter desert the military or naval service, and all persons who, being duly enrolled, shall depart the jurisdiction of the district in which he is enrolled, or go beyond the limits of the United States, with intent to avoid any draft into the military or naval service, duly ordered, shall be liable to the penalties of this section. * * *."

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Holt, 59 Me. 464, 465–466; *Severance* v. *Healey,* 50 N. H. 448, 451; *McCafferty* v. *Guyer,* 59 Pa. 109, 110, 113, 119, 123; *Huber* v. *Reily,* 53 Pa. 112, 119.[31] The rationale of the legislation has been stated in *State* v. *Symonds,* 57 Me. 148, 150: "[T]he object of the section in question [is] to prevent the offense of desertion by depriving the offender of his rights as a citizen of the United States. It is clearly within the constitutional province of the legislative department of the national government to define and prescribe the rights of citizenship of the United States, and to declare their forfeiture, as a penalty for deserting the army in a death-struggle of the government for the preservation of its nationality."

This 1865 statute was amended in 1912 to make it inapplicable in times of peace (Act of August 22, 1912, 37 Stat. 356), and it remained in effect until repealed by Section 504 of the Nationality Act of 1940 (54 Stat. 1172).[32] Thus, the statute involved here (Section 401 (j)) had behind it

[31] See also the Report of the Cabinet Committee which prepared the initial draft of the Nationality Act of 1940 (fn. 17, *supra,* p. 39). Hearings before the Committee on Immigration and Naturalization, House of Representatives, 76th Cong,. 1st Sess., on H. R. 6127 superseded by H. R. 9980, at pp. 491–492 (see also comments of Mr. Flournoy at Hearings, *ibid.,* p. 132–133, 186–187).

[32] Section 401 (g) of the 1940 Act provided for expatriation of those deserting the armed forces in time of war (54 Stat. 1169). This provision is apparently the reason for the total repeal of the 1865 Act which dealt both with deserters and with draft evaders.

the support of many years of history. When it was enacted in 1944, conditions incident to World War II revealed a special need to reinstate the provision for draft-evaders. H. Rep. No. 1229, 78th Cong., 2d Sess., which accompanied the bill which became Section 401 (j), spells out the circumstances, at pp. 1–2:

> It is, of course, not known how many citizens or aliens have left the United States for the purpose of evading military service. The Department of Justice discovered that in the western district of Texas, in the vicinity of El Paso alone, there were over 800 draft delinquents recorded in the local Federal Bureau of Investigation office, born in this country and, therefore citizens, who had crossed the border into Mexico for the purpose of evading the draft, but with the expectation of returning to the United States to resume residence after the war.

In these circumstances, Congress cannot be charged with unreasonable or arbitrary action. Conscientious scruples aside, readiness to serve in the country's armed forces in time of war or emergency has always been a cardinal element of American citizenship. As monuments throughout the land attest, the country's demand upon the citizen-soldier has been deemed the highest call to duty. When the draft-evader adds lurking abroad to his willful repudiation of this obligation, he cannot challenge Congress' dissolution of

the ties of allegiance between him and the nation. For not only has he rejected his highest duty of citizenship and kept himself beyond the reach of the American criminal sanctions designed to compel him to fulfill that duty. He is also, in effect, choosing whatever protection he may obtain from another country, as against the protection of the United States and it correlative obligations. This is at least as much the outward manifestation of a preference for another country as the marriage to an alien (within the United States) involved in *Mackenzie* v. *Hare,* 239 U. S. 299, or the mere five-year foreign residence involved in *Lapides* v. *Clark,* 176 F. 2d 619 (C. A. D. C.), certiorari denied, 338 U. S. 860. It is certainly a more decided repudiation of allegiance to this nation than those two acts of expatriation, or the act of voting in a foreign election. One who intentionally chooses foreign residence in place of the military burdens of citizenship is hardly in a position to assert that Congress has acted unreasonably in drawing conclusions from his choice. It was not by chance that the first federal expatriation statute was the 1865 Act dealing with deserters and draft-evaders. Repudiation of the citizen's duty to help preserve the nation in time of war has traditionally been regarded as cause for severing the cords of allegiance.

CONCLUSION

For these reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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NOVEMBER 1955.

war with permission of competent military or naval authority, prior or subsequent to [January 20, 1944], shall be deemed to have the immediate effect of restoring such nationality or citizenship and all civil and political rights heretofore or hereafter so lost and of removing all civil and political disabilities resulting therefrom; or

(h) Committing any act of treason against, or attempting by force to overthrow or bearing arms against the United States, provided he is convicted thereof by a court martial or by a court of competent jurisdiction; or

(i) Making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense; or

(j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States.

* * * * *

SEC. 403. * * *

(b) No national under eighteen years of age can expatriate himself under subsections (b) to (g), inclusive, of section 401.

* * * * *

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REME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 111

DANIEL CASTANEDA GONZALES,
Petitioner,
vs.
LANDON, District Director of Immigration and Naturalization of District No. 16, et al.

T OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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